Supreme Court, U.S.
FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners

Questions Presented

Question No. 1

The petitioner was suspended in a completed state court proceeding, primarily for alleged violations of the Texas advertising rules. He attempted to raise, in the state court proceedings, two important constitutional issues (among others): (1) whether his rights under the First Amendment were violated by reason of the prosecution under the advertising rules; and (2) whether he was the victim of a selective discriminatory prosecution in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. The state courts failed and refused to address these issues. Petitioner later filed the present civil rights suit in the federal district court below and asserted in the

complaint, on behalf of himself and a class composed of solo practitioners in Texas, a broad, general attack upon the disciplinary scheme in Texas, alleging that it unconstitutionally discriminates against solo practitioners and unduly protects members of large law firms. The Fifth Circuit held that the federal courts do not have subject matter jurisdiction over such general constitutional attack.

The first question presented is whether the federal courts do have, as an exception to the Feldman doctrine, subject matter jurisdiction over the broad, general class action, constitutional attack upon the Texas' disciplinary scheme or whether the Fifth Circuit was correct in holding that such general constitutional attack was "inextricably intertwined" with the prior

state court action just because there was some relationship between such prior action and the general constitutional attack, and despite the fact that it would not be necessary for the federal court to review the state court judgment in order to resolve the general constitutional attack? In addressing this question the Court would be resolving a conflict between two lines of cases among the circuit courts of appeals and would be resolving a question of exceptional importance.

Question No. 2

The second question presented is whether the refusal and/or failure of the Texas state courts to address, and "fully and fairly" adjudicate in the prior state court action, the two important constitutional issues referred to above - the First Amendment issue and the Equal

Protection, discriminatory prosecution issue - vested, separate and apart from the exception to the Feldman doctrine, subject matter jurisdiction in the federal courts to determine whether such refusal and/or failure to adjudicate those important constitutional issues in itself constituted a violation of petitioner's rights under the Due Process clause. Again, the Fifth Circuit's holding in this regard directly conflicts with a number of Supreme Court and other circuit courts of appeals' decisions.

Question No. 3

The petitioner also alleged that the entire proceedings against petitioner, from start to finish, had been fraught with bad faith, bias, flagrant abuse of constitutional rights, frivolous and malicious prosecutions, duress, retaliation and harassment, and that this

bad faith conduct includes subsequently filed, still ongoing, disciplinary proceedings, which proceedings are also frivolous and filed in bad faith and in retaliation against petitioner for filing this federal court suit. The Fifth Circuit ruled that it did not have subject matter jurisdiction over petitioner's bad faith claims under the bad faith exception to Younger because, it held, that the bad faith doctrine is not an exception to Feldman.

The third question presented is whether the federal court has subject matter jurisdiction with respect to a completed state court action conducted in bad faith, where most of the facts and circumstances indicating bad faith did not arise or become known until after the state court had entered judgment in the prior state court action and whether,

even if there is no subject matter jurisdiction over the completed state court action, there is still subject matter jurisdiction to consider whether the subsequently filed state court actions, which are still ongoing, are being conducted in bad faith and for retaliation and harassment purposes.

Again, the holding of the Fifth Circuit in regard to the bad faith claims is in direct conflict with decisions of the Supreme Court and other circuit courts of appeals.

Question No. 4

The Fifth Circuit issued a published opinion on July 19, 1994. It partially reversed and partially affirmed, holding that the district court should have accepted jurisdiction over petitioner's bad faith claims. None of the parties filed a petition for rehearing or

rehearing en banc. Far more than 21 days after the issuance of the July 19, 1994 opinion, on September 23, 1994 the Fifth Circuit, without any notice to the parties and without any explanation as to why it had not issued the mandate as required by Rule 41(a), F.R.A.P., withdrew its July 19, 1994 opinion and replaced it with an opinion in which it completely affirmed the dismissal by the district court.

The fourth and final question presented is whether the Fifth Circuit panel had the power to, or could properly, issue a new opinion long after the 21 days provided for in rule 41 had expired, particularly where the new opinion changed the substantive holding in the case and did so without alluding to any "exceptional circumstances" or "good cause" sufficient to "override the

strong public policy that there should be an end to a case in litigation"? The holding of the Fifth Circuit that it could simply change its mind after the 21 day period provided for in Rule 41 had expired is in direct conflict with a number of opinions of the other circuit courts of appeals.

LIST OF PARTIES

Petitioners/Appellants/Plaintiffs

Benton Musslewhite

Respondents/Appellees/Defendants

The State Bar of Texas
M. Collen McHugh
Martha S. Dickie
Charles A. Beckham
Antonio Alvarado
Steven L. Martin
Charles O'Reilly
Kirk Watson
Jerry Secrest
Spencer C. Relyea
Richard C. Hile
Tom Cunningham
James M. McCormack
Karen R. Johnson
Steven Peterson
Steven Smoot
James N. Parsons
Harriet Miers
Charles R. Dunn

TABLE OF CONTENTS

Questions Presented. i

List of Parties. ii

Table of Contents. iii

Table of Authorities. v

Opinions Below 1

Jurisdiction. 2

Constitutional Provisions and Statutes 3

Statement of the Case 4

Reasons for Granting the Writ 27

I. The Fifth Circuit; Holding That the Federal Court Does Not Have Subject Matter Jurisdiction Over The Broad and General Class Action Attack Upon The Disciplinary Scheme of the State Bar of Texas - To The Effect that It Discriminates, In Violation of the Fourteenth Amendment, Against Solo Practitioners - Conflicts With Several Decisions of Other Circuit Courts And Presents A Question of Exceptional Importance 29

II. The Implied Holding Of The Fifth Circuit - That The Federal Courts Cannot Assume Jurisdiction Over Constitutional Issues That The

State Courts Failed or Refused To Adjudicate or That Could Not Have Been Adjudicated In The State Court - Is Contrary To Supreme Court Decisions, and Decisions Of Other Circuit Courts of Appeals And Present A Question Of Exceptional Importance 42

III. The Fifth Circuit's Refusal to Hold That the Federal Courts Had Jurisdiction Over The Claims of Bad Faith, Retaliatory and Harassing Prosecution Again Placed It In Direct Conflict With A Number of Supreme Court and Other Circuit Court Decisions And Again Presents A Question of Exceptional Importance. 56

IV. Certiorari Is Appropriate With Respect To The Action Of The Fifth Circuit In Issuing A New Opinion More Than 21 Days After its Earlier Opinion, Without Providing an Explanation Showing That There Existed Exceptional Circumstances For Overriding The Strong Public Policy That There Should Be An End To Litigation. 64

Conclusion and Prayer. 67

Certificate of Service. 68

TABLE OF AUTHORITIES

Adamson v. Lewis, 955 F.2d 614, 619 (9th Cir. 1992)

Bates v. Arizona State Bar, 433 U.S. 356, 383, nte 37 (1977)

Bates v. Arizona State Bar, 433 U.S. at 383

Black v. Cook County Officers Electorial Board, 750 F. Supp. 901, 903 (N.D. Ill. 1990)

Bryant v. Ford Motor Company, 886 F.2d 1526 (9th Cir. 1989)

Berman v. Fla. Bd. of Bar Examiners, 754 F.2d 1529, 1530 (11th Cir. 1986)

Central Avenue News, Inc. v. City of Minot, 651 F. 2d 565 (8th Cir. 1981)

Cibior v. Berryhill, 93 S. Ct. at 1697

Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982)

District of Columbia v. Feldman, 460 U.S. 465, 103 S.Ct. 1303
(1983)

Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221-22 (9th Cir. 1994)

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Guess v. Bd. of Medical Examiners of State of N. Car., 967 F.2d 998, 1002-05 (4th Cir. 1992)

Haring v. Prosier, 103 S. Ct. 2360, 2373 (1983)

Hines v. Royal Indemnity Co., 253 F.2d 171, (6th Cir. 1958)

Huffman v. Pursue, Ltd., 420 U.S. 592, 599-602, 95 S. Ct., 200, 1206-07, 1212 (1975)

In Re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17, 26 (1st Cir. 1982)

Johnson v. De Grandy, 114 S.Ct. 2647, 2654 (1994)

Kercado - Malendez v. Aponte -Rogue, 829 F. 2d 255, 264 (1st Cir. 1987)

Leaf v. Sup. Ct. of State of Wisconsin, 979 F.2d 589, 597-99 (7th Cir. 1992) cert. den. 113 S.Ct. 2417

Lynk v. LaPorte Superior Court No. 2, 785 F. 2d 554, 564-65 (7th Cir., 1986)

Mackay v. Pfeir, 827 F.2d 540, 542-45 (9th Cir. 1987)

Marks v. Stinson, 19 F.3d 873, 885-86, nte 11 (3rd Cir. 1994)

Matter of Jacques, 407 Mich. 26, 291 N.W. 2d 469 (1976)

Musslewhite v. State Bar of Texas, 786 S.W.2d 437, (Tex.App.-Hou [14th Dist.] 1990)

Musslewhite v. State Bar of Texas, 25 F.2d 1300 (5th Cir., July 19, 1994)

Partington v. Gidon. 961 F.2d 852, 864, 65 (9th Cir. 1992)

Powers v. Bethlehem Steel Corporation, 483 F.2d 963, 964 (1st Cir. 1973)

Razatos v. Colorado Sup. Ct., 746 F.2d 1429, 1433 (10th Cir. 1984)

Ritter v. Ross, 992 F.3d 750, 752-54 (7th Cir. 1993) cert. den. 114 S.Ct. 694

Robinson v. Ariyosh; 753 F. 2d, 1460, 1472 (9th Cir., 1975)

Roller v. Holly, 176 U.S.398 (1900)

Schneider v. Colegio de Abagados de Puerto Rico, 917 F.2d 620, 628-29 (1st Cir. 1990)

Schumacher v. Nix., 965 F. 2d, 1262, 1266, nte 6 (3rd Cir. 1992)

Sheppard v. Maxwell, 394 U.S. 333 (1966)

Sims v. Moore, 99 S. Ct. 2376, 2378 (1979)

Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982)

Spencer v. Honorable Justices of Supreme Court of PA, 579 F. Supp. 880 (E.D. Pa. 1984)

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Trainor v. Hernandez, 431 U.S. 434, 446, 97 S. Ct., 1911, 1919

Timmerman v. Brown, 528 F. 2d 811, 815 (____ Cir. 1977)

Wind v. Orange County, 715 F. 2d, 1543 (11th Cir., 1983) cert. den. 467 U.S. 1210 (1984)

Wright v. Tackett, 39 F.3d 155, 157, 58 (7th Cir. 1994)

Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 677-78

Zimmerman v. Grievance Committee of Fifth Jud. Dist., 726 F.2d 85, 86 (2nd Cir. 1984)

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971)

Zipfel vs. Halliburton, 861 F.2d 565, 567 (9th Cir. 1988)

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Petitioner, Benton Musslewhite, files this petition and brief to urge the Court to grant certiorari and review of the decisions below.

OPINIONS BELOW

The opinion under the U.S. Court of Appeals for the 5th Circuit, concerning

which Writ of Certiorari is sought in this case, can be found at 32 F. 3d 942, (5th Cir., Sept. 23, 1994) and is reproduced as App. A., p. A1 of the Appendices. The first opinion of the Court of Appeals, which was subsequently withdrawn, was at one time reported in 25 F. 3d 1300 (5th Cir., July 19, 1994) and is attached as Exhibit B, p. A26 of the Appendices. The decision of the Federal District Court is unreported and is reproduced as App. C, p. A57 of the Appendices.

JURISDICTION

The Court has jurisdiction to review a final judgment of a court of appeals pursuant to 28 U.S.C. § 1254 (1). The final judgment of the Court of Appeals was entered on September 23, 1994 and a timely filed Petition for Rehearing and

Rehearing En Banc was overruled on December 5, 1994. The Order overruling Petition for Rehearing and Rehearing En Banc is reproduced as App. D, p. A59 of the Appendices. The copy of the Plaintiff's Original Complaint in the U.S. District Court for the Southern District of Texas is reproduced as App. E, p. A61 of the Appendices.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First and Fourteenth Amendments to the U.S. Constitution. The First Amendment is reproduced as App. F, p. A99 of the Appendices and the Fourteenth Amendment is reproduced as App. G, p. A103 of the Appendices. This case also involves Rule 41, Federal Rules of Appellate Procedures. Rule 41 is reproduced as App. H, p. A113 of the Appendices.

A. Statement of the Case and Procedural History

This case involves a civil rights action against the State Bar of Texas ("SBOT") and some of its present and former officers. The petitioner alleges that he was, and still is, the victim of a discriminatory, unconstitutional and persecutorial vendetta that was and still is being conducted in bad faith and seeks relief both individually and as representative of a class.

Petitioner concedes that he has always been a controversial trial lawyer.[1] His aggressive use of press

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[1] Petitioner received his undergraduate and LLB from Southern Methodist University, graduating from law school with honors (order of the Woolsack); a degree in Military Law from the University of Virginia; and a LLB from Georgetown University, again graduating with honors. He was later appointed by President Kennedy as Advisor to the National Council on Physical

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Fitness and to the Advisory Council for the Area Redevelopment Administration. He has always been a controversial member of the liberal wing of the Democratic Party, having, in 1962, lost a race for Congress against a popular incumbent conservative Democrat by a margin of only 41 votes out of 65,000 cast and having been one of only two delegates, out of 100 in the Texas delegation to the 1968 Democratic Convention, to vote for Senator Eugene McCarthy as the nominee for President. As a lawyer he has specialized in international law, handling numerous cases on behalf of non-American plaintiffs, see Chick Kam Choo v. Exxon, 486 U.S. 140 (1988), and environmental law, having been one of the nine members of the Agent Orange Plaintiffs Management Committee ("AOPMC") in the Agent Orange Class Action in Brooklyn, N.Y. and having been the only one of the nine to have resigned from the AOPMC in order to oppose what he considered to be a "grossly inadequate settlement that is a disgrace to the memory of those who served our country in Vietnam." See In Re Agent Orange, 800 F.2d 14 (2nd Circ. 1986) (rejecting the effort of the other members of the AOPMC to have petitioner disqualified from opposing the settlement) and 818 F.2d 145 (2nd Circ.) cert. den. 484 U.S. 1004 (1988) (affirming the settlement over petitioner's opposition). Petitioner is the only member of the original AOPMC who is still fighting for compensation for veterans and civilians who were injured

conferences at or near mass disasters - particularly foreign disasters - to make victims and their personal solicitors, barristers or attorneys aware of the potential for bringing their lawsuits in the United States, angered a number of influential members in the power structures of both the defendants' and

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by exposure to Agent Orange in Vietnam. See Ivy v. Diamond Shamrock, 901 F.2d 7 (2nd Circ. 1990) cert. den. 114 S.Ct. 1125 (1994) and Ryan v. Dow Chemical, 781 F.Supp. 934 (E.D.N.Y. 1992) lv. to Appl. den., No. 92-8008 (2nd Cir. May 8, 1992, Appl, dism., No. 92-7846 (2nd Cir. June 16, 1992) cert. den. 113 S.Ct. 599 (1992). Petitioner refused to join the Houston Trial Lawyers Association and resigned from the Board of Directors of the Texas Trial Lawyers Association because he believed they had forsaken aggressive protection of victims' rights for a superficial attempt to wrap themselves in the flag of self righteous ethics. Petitioner is also president and chairman of the Board of Directors of One World Now, Inc., a non-profit organization dedicated to transforming, democratizing and empowering the United Nations.

plaintiffs' bar. What these powerful individuals and the SBOT, principally through its general counsel and assistant general counsel, Steve Peterson ("Peterson") and Steve Smoot ("Smoot"), conspired to do, and did do to the petitioner, is shameful and reprehensible. Simply stated, they set out to destroy the petitioner, to make him a scapegoat for a politically motivated crusade against"solicitation" and to chill the exercise of his First Amendment rights. So far they have succeeded.

In 1987, the SBOT instituted two frivolous lawsuits in the Texas state court to disbar petitioner. The primary focus of these two lawsuits was "solicitation" and they coincided with the politically volatile "tort reform"

crusade in the Texas Legislature that year. A disbarment suit was also filed by the SBOT against John O'Quinn ("O'Quinn"), containing the very same solicitation allegations that had been asserted against petitioner except that additional allegations were asserted against O'Quinn. The SBOT hired a special prosecutor, Tom Alexander ("Alexander"), to prosecute petitioner and O'Quinn, provided him with a substantial slush fund and authorized him to hire the nationally known investigator, Clyde Wilson. Alexander maliciously prosecuted the case against petitioner and O'Quinn in the press, in violation of their due process rights. See Sheppard v. Maxwell, 394 U.S. 333 (1966). But to Alexander's credit, he did discover and expose the fact that

Peterson had made a secret sweetheart deal with O'Quinn whereby O'Quinn would be let off with a "wrist-slap" reprimand and the vendetta would continue with petitioner as its sole scapegoat. After that revelation, Peterson/O'Quinn et. al. succeeded in getting Alexander fired.

Then petitioner made his greatest mistake. He naively believed that he could trust Peterson, Smoot and the SBOT to keep their word and he entered into a settlement. On the basis of their express and implied assurances, which turned out to be false and fraudulent, see paragraph 8 of the complaint attached as App. 8, petitioner agreed to a settlement that included a 3-year probation.[2] Within eight months of that

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[2] Other considerations that prompted petitioner to accept the settlement were that he was financially

settlement, however, Peterson, Smoot, Jim Sales, then President of the SBOT, Hartley Hampton, a member of the power structure of the plaintiffs' bar, and the SBOT (hereinafter collectively referred to as SBOT) launched a vicious and frivolous revocation proceeding based upon trumped up charges primarily centered upon petitioner's exercise of his First Amendment rights in a press conference in Aberdeen, Scotland in connection with the Piper Alpha disaster.[3]

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exhausted, facing a heavy trial and appellate docket for the upcoming next few months, and simply wanted to buy his peace.

[3] The SBOT based its revocation petition pertaining to the Piper Alpha matter upon 3 communications: a press release, newspaper ad and a letter. It was undisputed that in all three, the survivors of the victims of that tragic disaster were expressly told that

SBOT brutally disregarded procedural due process, giving petitioner only 6 days notice of both the revocation petition and trial, in violation of Roller v. Holly, 176 U.S.398 (1900) and Rules 99 and 245 of the Texas Rules of Civil Procedure, and putting petitioner to trial without an attorney and time to prepare. The appointed trial judge, Judge Solomon Casseb, who was the trial judge in the Texaco/Pennzoil case and extremely friendly with members of the plaintiffs' bar power structure who were unfriendly to petitioner, and therefore biased. He refused to grant petitioner a jury trial, in violation of the State Bar Rules (then Art.10, Sect. 16(I)), the

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petitioner and his team of lawyers would not discuss or accept representation except through the survivors' personal solicitors or attorneys.

implied terms of the agreed settlement and the doctrine against anticipatory waiver of the right of trial by jury.

Judge Casseb also ignored the mandate in Bates v. Arizona State Bar, 433 U.S. 356, 383, nte 37 (1977) that the state cannot regulate speech of an attorney directed toward those who are "legally sophisticated", such as other attorneys, see discussion under II, infra, blatantly refusing to adjudicate petitioner's First Amendment claims. Judge Casseb also refused to adjudicate the discriminatory prosecution issue. Moreover the full extent of the facts relevant to the discriminatory prosecution of petitioner did not become discernible until long after the judgment was entered in the revocation proceedings.

Judge Casseb revoked probation and imposed punishment - 3 years suspension- so excessive that it violated petitioner's due process rights. See Solem v. Helm, 77 L.Ed.2d 637 (1983).[4] The petitioner appealed to the Texas court of appeals but that Court deferred the First Amendment issue to the Texas Supreme Court. Musslewhite v. State Bar of Texas, 786 S.W.2d 437, (Tex.App.-Hou [14th Dist.] 1990). Judge Casseb also refused to adjudicate the discriminatory prosecution issue and the state court of appeals expressly and flatly refused to permit petitioner to raise the

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[4]The great majority of attorneys in Texas have received only a reprimand for violations of the advertising rule, DR2-101. Up to the time of petitioner's prosecution, the most that any Texas attorney, other than petitioner, had ever received for a violation of the advertising rule is a 60-day suspension.

discriminatory prosecution issue in that Court. The Texas supreme court refused writ of error and this Court refused writ of certiorari. 111 S.Ct. 2891 (1991).

Thus, the state courts failed and refused to address and decide the two key constitutional issues in the case - whether the petitioner's communications seeking to obtain an audience with other lawyers and solicitors were protected by the First Amendment and whether petitioner had been the victim of discriminatory prosecution in violation of the Equal Protection clause of the Fourteenth Amendment.

Long after Judge Casseb had handed down his brutal judgment, the defendants finally concluded their sweetheart deal with O'Quinn, agreeing to give him a reprimand. In the Texas Lawyer, the deal

was labeled a "wrist-slap" and Peterson was quoted as admitting that the SBOT really did not ever have a solicitation case against O'Quinn, which means, even more so, that the SBOT never had a solicitation case against petitioner.[5]

Also, long after Judge Casseb entered his judgment, it became apparent that the SBOT was not going to prosecute Kelly Newman ("Newman"). He was in Scotland with petitioner and much more

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[5] At the inception of the State Bar anti-solicitation crusade, the State Bar announced it was investigating "17 lawyers". One of those was an attorney by the name of Arthur Schechter ("Schechter"). The Bar had substantial evidence that Schechter had maintained the classic case-running operation in his office, (using the taking of photographs as a pretext for bait-and-switch solicitation) but Schechter hired an attorney by the name of David Berg ("Berg"). Berg was known to be close to Peterson. Schechter was never prosecuted. O'Quinn also hired Berg and Berg worked out the sweetheart deal with Peterson on behalf of O'Quinn.

heavily involved in the press release, ad and letter pertaining to the Piper Alpha disaster, than was petitioner. Newman and petitioner jointly prepared the press release but Newman alone prepared and signed the letter and ad (petitioner was not ever mentioned in either) and it was undisputed that Newman sent and ran them over petitioner's strenuous objection. Yet the SBOT, while condemning petitioner to three years of misery, made no effort to prosecute Newman. In July of 1993, the statute of limitations ran with regard to any prosecution of Newman.

Furthermore, again long after the judgment in the underlying action was rendered, it became apparent that SBOT had no intention of attempting to prosecute any of the other "17 lawyers" they initially stated they were

investigating.

The discriminatory treatment of petitioner, when compared to that of O'Quinn, Schechter and Newman and the other plaintiffs' lawyers who supposedly had been targeted for investigation for solicitation, clearly violated petitioner's due process and equal protection rights. See Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982) and discussion under II, infra.

Petitioner then filed a bill of review in state court (to set aside the agreed settlement which had been used as the basis for the revocation proceeding) and the SBOT retaliated by filing another frivolous disbarment suit in the state court, which is still pending. Petitioner then filed this suit in federal court and the SBOT again

retaliated with another frivolous disbarment suit in state court, which also is still pending.

The petitioner's allegations in this suit can be divided into five primary categories: (1) broad class action general, constitutional assault upon the entire State Bar disciplinary scheme, alleging that, as designed, implemented and enforced, it unconstitutionally discriminates against solo practitioners;[6] (2) claims that, as an

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[6] This discrimination against sole practitioner was foreseen by the Texas supreme court itself in O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 404 (Tex. 1988), wherein Justice Kilgarlin, speaking for the Court, stated:

> "One point, not raised, and as to which there has been no development of facts, troubles us. That concern is the concession made during oral argument by counsel for the State Bar that he knew of no instances of grievance prosecution of lawyers who make in-person solicitation of

potential clients either personally or through agents, apart from plaintiffs' attorneys in personal injury litigation. Indeed, this selective prosecution seems to enjoy the sanction of the State Bar Rules.....Thus, solicitation of a casualty insurance company's claims manager might pass muster or the wining and dining of a corporate executive thinking of relocating his company in Texas could be arguably acceptable, even though the conduct in both instances amounts to "running cases." One need only read the occasional stories in newspaper business sections to be aware that sophisticated solicitation by law firms of corporate clients occurs more than infrequently.....Without a development of facts by the trial court, however, this court cannot pass upon the question of whether the disciplinary rules are constitutionally infirm because of the apparent inequality in their enforcement. Nevertheless, if in-person solicitation of clients is an evil requiring prevention, the restriction should be applied to all lawyers irrespective of whether they litigate or never go to the courthouse, whether they represent plaintiffs or defendants, or whether the action sounds in tort or contract."

763 S.W.2d at 404

exception to the Rooker/Feldman and Younger doctrines, the prosecution of petitioner in the past and ongoing state court cases was and is being carried out in bad faith, with the purpose of retaliating against and harassing the petitioner; (3) a group of specific constitutional claims (primarily the First Amendment and discriminatory prosecution claims) that are not barred by Rooker/Feldman because petitioner did not have a reasonable opportunity to litigate them in state court since either the state courts refused to consider them or their facts did not crystallize until after the state court proceedings were completed; (4) claims involving declaratory judgment and injunctive relief with respect to the prospective

impact of defendants' unconstitutional actions; and (5) pursuant to the pendant jurisdiction of the court, a direct attack upon the prior state court judgment by way of bill of review. See complaint attached as App. E.[7]

After the district court dismissed all claims on the ground that it had no subject matter jurisdiction, the Panel partially reversed and partially affirmed, holding that petitioner could proceed on his bad faith claims. Musslewhite v. State Bar of Texas, 25 F.2d 1300 (5th Cir., July 19, 1994); opinion attached because withdrawn; see

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[7] Lest the Court assume that petitioner is taking liberties with the facts alleged in the complaint, most of the matters asserted can be found in the record, newspaper articles and the SBOT files, to which the San Antonio press had, at one time, access.

App. B. Neither petitioner nor the defendants filed a petition for rehearing or rehearing en banc with respect to the July 19th decision. Without any prior notice to the parties, the Panel withdrew its July 19th opinion and filed another opinion on September 23, 1994. App. A. In that opinion the Panel completely affirmed, holding that all of petitioner's claims, including the bad faith claims, were barred by the Feldman doctrine. The Panel made no attempt to advance any "exceptional circumstances" that would justify not issuing the mandate on the 21st day after the July 19th decision; it cited no sudden change in the law; it is obvious, from a comparison of the two decisions, that, some 46 days after it was supposed to have issued the mandate, the Fifth

Circuit Panel for some strange reason simply changed its mind.

It is important to note that the Panel below, in both the first and the second decisions, did not question that the petitioner had adequately alleged the five categories of claims listed above. Therefore, this is not a case involving questions of construction of a complaint, although the Panel did place an erroneous "spin" upon many of the allegations.

The issues presented in this petition relate to the substantive erroneous holdings of the Fifth Circuit in its second decision. Properly framed, these holdings are:

(a) That a broad, sweeping, class action allegation "generally attacking" the Texas State Bar disciplinary scheme -

on the ground that it discriminates, in violation of the equal protection clause, against solo practitioners - cannot be asserted by any person against whom a final judgment of discipline has been previously rendered, even though no such broad constitutional, class action attack was a part of the prior state court case; even though, as to that one person, the state courts in the prior case refused to adjudicate the issue of discriminatory prosecution and/or the facts relevant to discriminatory prosecution did not become discernible until <u>after</u> the judgment was rendered in the prior case; and even though the prosecution of such person in the prior case - as that prosecution stands in the light of later events - is but one evidentiary example, out of many, tending to prove the merits of the

general constitutional attack upon the disciplinary scheme of the State Bar. See 32 F.3d at 947; App. A.

(b) That, despite an adequate allegation of bad faith prosecution involving retaliation and harassment, a person cannot sue in federal court under the Civil Rights Act where a previous judgment of discipline has ever been rendered against him, because the Feldman doctrine[8] does not recognize an exception based upon bad faith, unconstitutional, retaliatory and harassing prosecution; the Fifth Circuit necessarily held that, even where, as in this case, the prior prosecution is but one example, among many others, of bad faith prosecution

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[8] District of Columbia v. Feldman 460 U.S. 462, 103 S.Ct. 1303 (1983).

against an individual and the pattern of bad faith, retaliatory and harassing prosecution is still ongoing[9], the federal court, because of the Feldman doctrine, still will have no jurisdiction. 32 F.3d at 947, 948; App. A.

(c) Though recognizing the rule that a federal civil rights suit is

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[9] The Fifth Circuit stated that "the state proceeding here in question is not ongoing." 32 F.3d at 948; App. A. This is a remarkable, really shocking, statement in view of the express allegation in the Complaint in question that: "Defendants' vendetta is ongoing as evidenced by the fact that they (the State Bar and Defendants) have filed new disciplinary charges against (plaintiff), which charges are known by Defendants to be without merit. Said charges are currently pending before the 265th District Court of Harris County, Texas." par. 3.42, App. E. In the prayer, petitioner asked for an injunction against such further prosecutions. App. E.

generally viable where it is alleged that "the state prosecution is taken for the purpose of deterring constitutionally protected conduct", citing Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982)[10], the Fifth Circuit nevertheless held that such rule[11], in view of

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[10] Petitioner expressly alleged:

"Defendants' conduct as alleged herein has deprived, and continues to deprive, Plaintiff of his rights secured under the First Amendment to the U.S. Constitution"; par. 5.4, App. E, and see par.3.43 (re "chilling effect .. from further exercise of the liberties of speech"), App. E.

[11] The Fifth Circuit never mentioned the fact that the state courts refused to adjudicate the First Amendment and the discriminatory prosecution issues. Nor did the Fifth Circuit mention that the relief sought was aimed at prospective effects and did not seek to overturn the prior judgment of discipline (except through the "bill of review", a direct attack upon the judgment based upon the "pendant jurisdiction" of the court). See entire Opinion, App. A.

Feldman, does not apply where the plaintiff has ever been successfully disciplined in a prior proceeding.

(d) The Fifth Circuit in this case necessarily held that other issues which usually justify federal civil rights jurisdiction - such as the refusal and failure of the state courts, in the prior proceeding, to adjudicate constitutional issues raised by the complaining party, or such as where the key facts relevant to such constitutional issue do not materialize until after the judgment has been rendered in the prior proceeding so that the complaining party could not have raised such issues even if he had wanted to - can simply be ignored at the whim of the court.

As will be shown, the above holdings are in direct conflict with Supreme Court

law and/or the holdings of the other courts of appeals.

Reasons For Granting The Writ

II. The Fifth Circuit Holding That the Federal Court Does Not Have Subject Matter Jurisdiction Over A Broad and General Class Action Attack Upon The Disciplinary Scheme of the State Bar of Texas - To The Effect that It Discriminates, In Violation of the Fourteenth Amendment, Against Solo Practitioners - Conflicts With Several Decisions of Other Circuit Courts And Presents A Question of Exceptional Importance.

As noted above, the petitioner alleged in clear and certain terms, on behalf of himself and a class he seeks to represent, that:

> "9.2 Defendants unfairly target attorneys involved in the solo practice of law....for prosecution and punishment under the Defendants' disciplinary rules. Defendants ignore or lightly treat alleged rule violations by members of larger firms. This distinction maintained by Defendants is

> arbitrary in that it bears no rational relationship with any legitimate end of Defendants.
>
> 9.3 The members of the class of small firms or solo practitioners are suffering deprivation of their rights of equal protection and due process of law at the hands of Defendants.....
>
> 9.6 Defendants' practices are in violation of the rights of the class as a whole. Therefore, damages, declaratory and injunctive relief with respect to the class.....is appropriate."

Par. 9, App. E.

It is obvious that, at no place in the Complaint, did the petitioner ever seek, on behalf of himself insofar as the class action cause of action is concerned, or on behalf of the class, to have the district court act as an appellate court with respect to the prior judgment of suspension against petitioner. While the complaint did say

that the discriminatory prosecution of Petitioner in the underlying state court proceeding "is consistent with Defendants' continuing policy of selective and unfair prosecution against certain members of the Bar of this State", the success or failure of the class action was not dependant upon whether the underlying state court judgment against petitioner was proper or not.

Indeed, the only direct assault against the underlying state court judgment was made in the allegation of the pendant jurisdiction claim of a "bill of review", which is the procedure for directly attacking state court judgments under Texas law. See par. 8, App. E. Perhaps the inclusion of the "bill of review" confused the courts below, but it

should not have.

In Feldman, the Court directly addressed the question of subject matter jurisdiction in civil rights cases brought by a plaintiff against whom a prior state court judgment has been entered, involving the same general subject matter as the subsequent civil rights suit. The Court laid down this venerable rule:

> "..Therefore, to the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petition for waiver, the District Court lacked subject-matter jurisdiction over their complaints. Hickey and Feldman should have sought review of the District of Columbia Court of Appeals' judgments in this Court. To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 46 I(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.

103 S.Ct. at 1315, 1316; emphasis ours.

The Court made it clear that "United States district courts ..have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case". 103 S.Ct. at 1317. The Court added a caveat which has become the source of some conflict among the circuit courts:

> "...If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do."

In Pennzoil v. Texaco, 481 U.S.1, 107 S.Ct. 1519 (1987), a clear majority of the Court agreed that the district

court in that case had initial subject matter jurisdiction over at least some of Texaco's constitutional claims, despite the existence of the state court judgment against it (see concurring opinions of Justices Scalia and O'Connor, 107 S.Ct. at 1529, 1530; Justices Brennan and Marshall, 107 S.Ct. at 1530, 1532[12]; Justice Blackmun, 107 S. Ct. at 1534-35; and Justice Stevens, 107 S. Ct. at 1535-38, particularly at 1536 and nte. 3). As Justices Scalia and O'Connor observed, in resolving "the constitutionality of the Texas bond and lien provision", the Court "need not decide any issue either actually litigated in the Texas courts or

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[12] Justice Brennan observed that the "inextricably intertwined" caveat does not apply if the federal action sought is "'separable from and collateral to' the merits of the state court judgment." 107 S.Ct. at 1531.

inextricably intertwined with issues so litigated." 107 S.Ct. at 1529-30.

The courts of appeals seem to have diverged into two approaches to this issue. Some seem to take the approach taken by the Fifth Circuit in this case - if the prior state court action has any relevance at all to the general constitutional challenge to the state rules in question, then the Feldman bar will apply and the federal courts will not have jurisdiction over such general constitutional challenge. See, in addition to the decision of the court of appeals in this case, the Seventh Circuit cases of Leaf v. Sup. Ct. of State of Wisconsin, 979 F.2d 589, 598-99 (7th Cir. 1992) cert. den. 113 S.Ct. 2417; Ritter v. Ross, 992 F.3d 750, 752-54 (7th Cir. 1993) cert. den. 114 S.Ct. 694; and

Wright v. Tackett, 39 F.3d 155, 157, 58 (7th Cir. 1994); the Fourth Circuit case of Guess v. Bd. of Medical Examiners of State of N. Car., 967 F.2d 998, 1002-05 (4th Cir. 1992); the Ninth Circuit cases of Mackay v. Pfeir, 827 F.2d 540, 542-45 (9th Cir. 1987) and Partington v. Gedan. 961 F.2d 852, 864-65 (9th Cir. 1992); and the Eleventh Circuit case of Berman v. Fla. Bd. of Bar Examiners, 754 F.2d 1529, 1530 (11th Cir. 1986).

On the other hand, there are a line of cases that definitely take a more liberal view of federal jurisdiction in these situations and are in conflict with the Fifth Circuit decision in this case and the decisions cited above. See the First Circuit case of Schneider v. Colegio de Abagados de Puerto Rico, 917 F.2d 620, 628-29 (1st Cir. 1990); the

Second Circuit case of Zimmerman v. Grievance Committee of Fifth Jud. Dist., 726 F.2d 85, 86 (2nd Cir. 1984); the Third Circuit cases of Schumacher v. Nix., 965 F. 2d, 1262, 1266, nte 6 (3rd Cir. 1992) ("although Schumacher applied for and was denied permission to sit for the Pennsylvania bar examination, the complaint before us presents a general constitutional challenge to Rule 203 (a)(2)(ii)") and Marks v. Stinson, 19 F.3d 873, 885-86, nte. 11 (3rd Cir. 1994); the Ninth Circuit case of Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221-22 (9th Cir. 1994); and the Tenth Circuit case of Razatos v. Colorado Sup. Ct., 746 F.2d 1429, 1433 (10th Cir. 1984).

The conflict between these two groups of cases is not based upon a

difference in facts but is based upon a very fundamental difference in their approach to the question of federal court jurisdiction in such cases and a very different spin upon the rules set forth by this Court in Feldman and Pennzoil v. Texaco. For example, in this case the Fifth Circuit rejected jurisdiction even though the class action general constitutional attack upon Texas' disciplinary scheme clearly could be resolved without regard to whether or not the judgment in the earlier state court proceeding was correct. The Fifth Circuit obviously felt that, just because petitioner was involved in both cases and petitioner was claiming discriminatory prosecution in both cases, the two cases are inextricably intertwined. On the other hand, in Schneider, Zimmerman,

Schumacher, Marks Dubinka and Razatos, the facts were basically the same as in this case- a broad constitutional attack alleged which generally related to the prior state court action but which did not require, for its resolution, a review or reexamination of the state court action - and these courts reached an opposite result, holding that the federal courts did have subject matter jurisdiction.[13]

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[13] For a statement of the essence of the liberal view, see Mattas v. Supreme Court of Pa., 576 F.Supp. 1178 (W.D. Pa. 1983) where the court stated:

> "The remaining counts ask us to consider the constitutionality of the disciplinary rules, because they....do not provide for a neutral decision-making body. Though these claims related indirectly to Mr. Mattas' particular case....we believe that the allegations regarding the hearings and the make-up of the boards are sufficiently general to permit this Court to review the specific order of

There are two other groups of cases with which the decision of the Fifth Circuit in this case fatally conflicts:

(a) Those cases which hold that where the allegedly similar issue (between the federal general constitutional challenge and the prior state court action) - in this case the issue of discriminatory prosecution in violation of the Fourteenth Amendment - was not actually adjudicated, though presented, in the state court case or for some reason could not have been presented in the state court case, the Feldman doctrine does not bar jurisdiction over

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suspension. Any decision we would make on the merits of these constitutional attacks would apply to any Pennsylvania lawyer facing disciplinary procedure."

576 F.Supp. at 1184.

the general constitutional challenge. See decisions discussed under II below.

(b) Those cases which hold that where some of the plaintiffs were not parties to the prior state court action, such plaintiffs' subsequent general constitutional challenge in the federal court certainly cannot be barred by the Feldman doctrine. See Johnson v. De Grandy, 114 S.Ct. 2647, 2654 (1994); Schneider, 917 F.2d at 629 ("Moreover, a contrary conclusion on the nature of the 1986 Rule would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs"); In Re Justices of the Supreme Court of Puerto Rico, 695 F.2d

17, 26 (1st Cir. 1982); and Leaf v. Supreme Court of State of Wisconsin, 979 F.2d at 597, 98.

Aside from the many conflicts with decisions of the Supreme Court and courts of appeal discussed above, the holding of the Fifth Circuit presents a question of exceptional importance. The Court, we respectfully submit, should grant writ to clarify what is meant by "inextricably intertwined". When a court, such as the Fifth Circuit in this case, can utilize that seemingly benign phrase to shut the federal courthouse door in the face of a general constitutional challenge under the civil rights laws, a great injustice has occurred and the civil rights jurisdiction of the federal courts has been improperly narrowed.

II. The Implied Holding Of The Fifth Circuit - That The Federal

Courts Cannot Assume Jurisdiction Over Constitutional Issues That The State Courts Failed or Refused To Adjudicate or That Could Not Have Been Adjudicated In The State Court - Is Contrary To Supreme Court Decisions, and Decisions Of Other Circuit Courts of Appeals And Presents A Question Of Exceptional Importance.

In Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430 (1990), the Court held that "a state court may not deny a federal right . . . in the absence of 'valid excuse'. . . An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source". 110 S. Ct. at 2440. The Court in Howlett expressly held that federal law includes civil rights claims under

the U.S. Constitution, in that case involving rights under the Fourth and Fourteenth Amendments.

Several courts of appeals have held that, if the state courts fail or refuse to adjudicate constitutional issues, or for some reason (such as the fact that they were not discernible at the time of the state court proceedings) they could not be "fully and fairly" adjudicated in the state courts, the federal courts have jurisdiction to adjudicate such constitutional claims because the failure of the state courts to adjudicate them is in itself a violation of due process. Wind v. Orange County, 715 F. 2d, 1543 (11th Cir., 1983) cert. den. 467 U.S. 1210 (1984); Robinson v. Ariyosh, 753 F. 2d, 1460, 1472 (9th Cir., 1975) vac. on other gnds., 477 U.S. 902 (1986), holding

that, because "the Hawaii Supreme Court refused to consider Robinson's federal claims" the federal court had jurisdiction); Lynk v. LaPorte Superior Court No. 2, 785 F. 2d 554, 564-65 (7th Cir., 1986); and see Sims v. Moore, 99 S. Ct. 2376, 2378 (1979); Haring v. Prosier, 103 S. Ct. 2360, 2373 (1983); 42 Rutgers Law Review at pp. 883-84;[14] and Black v. Cook County Officers Electorial Board, 750 F. Supp. 901, 903 (N.D. Ill. 1990).

All of these holdings directly conflict with the effective holding of

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[14]". . . There is a difference between asking a federal court to review the merits of a state court judgment and asking a federal court to enjoin procedures for enforcement of a state court judgment that allegedly denied the state court defendant due process and equal protection. Justice Brennan recognized this distinction by interpreting the scope of 'inextricably interwined' with the standard of 'separable from and collateral to'".

the Fifth Circuit in this case - that, despite the fact that the state courts failed and refused to consider and adjudicate petitioner's First Amendment claim (violation of free speech) and his Fourteenth Amendment claim (discriminatory and/or selective prosecution), the federal court had no jurisdiction.

C. The First Amendment Claim

As to the First Amendment claim, the communications that were the basis of the three-year suspension, all made it clear that neither the petitioner nor the team of lawyers with whom he worked would discuss employment or accept cases except through the personal lawyer or solicitor of the survivors of the victims. Thus, any dealings concerning employment would have been held only with sophisticated

lawyers and solicitors who could distill and understand the written communications and subsequent oral representations of petitioner or the members of his team and make an informed decision for the potential client as to whether he or she should employ petitioner and his team and participate in the litigation in the United States.

There is no doubt but that the three communications in questions were protected by the First Amendment. In Bates v. Arizona State Bar, 433 U.S. at 383, nte. 37, the Court held that a state cannot, in the face of the First Amendment, regulate speech of an attorney which seeks an audience with those who are "legally sophisticated", such as solicitors or other attorneys; Spencer v. Honorable Justices of Supreme Court of

PA, 579 F. Supp. 880 (E.D. Pa. 1984) aff'd 760 F. 2d 261 (3rd Cir. 1985);[15] and Matter of Jacques, 407 Mich. 26, 291 N.W. 2d 469 (1976).

The state trial judge ignored the First Amendment claims; the state court of appeal finessed the issue;[16] the Texas

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[15]In Spencer, the court, citing Bates, stated that "(l)awyers are capable of understanding, evaluating, and distilling legal advertisements and thus prohibiting plaintiff from making representations . . . to other lawyers is unnecessary to advance any state interest and therefore unconstitutional." 579 F. Supp. at 892.

[16]The State court of appeals stated: "Accepting the (Texas) Supreme Courts inherent power to adopt the rule (DR 2-101, the advertising rule), it is not our function as an intermediate appellate court to nullify or alter it (on constitutional grounds), for once the Court decides on a rule of law, the decision is, in the absence of a controlling decision by the United States Supreme Court, binding on lower courts until the Court changes the rule." 786 S.W. 2d at 441. In the first place, petitioner had contended that, under Supreme Court precedent, specifically

Supreme Court denied writ of error without an opinion, and this Court denied writ of certiorari without an opinion. 111 S. Ct. 2891 (1988). Thus, to this date, no state court has "fully and fairly" adjudicate the First Amendment issue, thus depriving petitioner of his due process rights under the Fourteenth Amendment.

b. Discriminatory and/or Selective Prosecution

Bates v. Arizona, either Rule 2-101 was unconstitutional as applied or, if intended to permit abridgement of free speech directed to a "sophisticated audience", then it was unconstitutional as written. Yet the Texas court of appeals still refused to do its duty and address the issue. Whether or not the Texas court of appeals was correct in its claim that it and all lower courts, including the trial court, were compelled by the Texas supreme court to abstain from deciding the constitutionality of DR-2-101 as written or applied, the fact remains that the Texas state courts did not give petitioner his day in court on that very important constitutional issue.

As noted above, there is overwhelming evidence that petitioner was the target of a vicious vendetta and discriminatory prosecution in violation of the Equal Protection clause. The complaint filed in this case outlines this sorry saga of selective and discriminatory prosecution. See pars. 3.10 through 3.43 of the Complaint, App. E; pars. 5.1 through 5.4 and the Prayer.

Many of the essential facts with reference to discriminatory prosecution did not materialize or become known until <u>after</u> the state court had entered the suspension judgment against petitioner - e.g. O'Quinn's sweetheart settlement; the preferential treatment given Schechter; the fact that the Bar was not going to prosecute Newman (as noted above, the statute did not run on Newman in 1992);

and the fact that none of the other 17 lawyers which the Bar said it was targeting were ever charged.

Even so, petitioner, when word of O'Quinn's sweetheart deal leaked, filed a Supplemental Brief in the state court of appeals with respect to discriminatory prosecution, but the court of appeals flatly refused to accept the Brief and a reading of the court of appeals' opinion discloses that the court, as had Judge Casseb, completely ignored the discriminatory prosecution issues.

Discriminatory prosecution in state bar disciplinary matters is an insidious evil. Usually, as in Texas, the highest court in the state adopts and enforces the disciplinary rules and, once a lawyer is charged, there is always the danger that the trial and appellate court judges

will be intimidated by the legal establishment into adversarially joining the fray against that lawyer. That is what happened here. Both Judge Casseb and the Texas court of appeals became willing tools in a state court process that was a "kangaroo court" from start to finish. And, as is averred in the class action allegations in this case, the weak members of the Bar (power-wise), such as solo practitioners, are victimized and the powerful members (the big law firms and the elites who control the plaintiffs' Bar) are immunized. To paraphrase those great words in Brown v. Board of Education, 74 S. Ct. 686, 692 (1954), ("separate and equal is inherently unequal"), a Bar Association that disciplines itself (instead of having a public entity such as the

Attorney General's office do it) is inherently discriminatory. See article in Lawyers Weekly U.S.A. by Michele Bates Deakin, dated July 19, 1993 (93 LWUSA 285), entitled "Discipline Targets Small Firm Lawyers.

This case is much like the situation before the court in Ciechon v. City of Chicago, 686 F. 2d 511 (7th Cir. 1982). There two paramedics employed by the City of Chicago were called to a home where a man complained of chest pains. They did not take him to the hospital and shortly thereafter he died at home. The relatives complained to the City. The City disciplined and dismissed one (Ciechon) and did nothing to the other (Ritt). The Court stated:

> "By so misusing its own procedures and by permitting itself to be so manipulated by the family, the City (of

Chicago) deprived Ciechon of due process of law. Olschock v. The Village of Skokie, 541 F. 2d 1254, 1257-58 (7th Cir. 1976) . . . all these irregularities add up to a case slanted from the start against plaintiff, heard by a kangaroo court, and denying her due process. . ."

"The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs. Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently. Ciechon was charged with failure to perform her duties and discharged; Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. United States v. Falk, 479 F. 2d 616, 619 (7th Cir. 1973) (en banc). . .

> Ritt either deserved to be discharged as Ciechon was, or Ciechon, like Ritt, deserved to be completely vindicated of all charges. There was no possible justification for treating them differently."

686 F. 2d at 521, 522, 523.

As noted above, Newman was more heavily involved than petitioner in the Pipes Alpha episode; yet, the Bar condemned petitioner to three years suspension and did not even charge Newman. The Bar has never offered any reason for this disparity in treatment. And the same is true with respect to petitioner and O'Quinn; petitioner and Schechter, and petitioner and the other 17 lawyers initially targeted.

Again, the failure of the state courts to adjudicate this important constitutional issue should have paved the way for the federal court in this

case to assert civil rights jurisdiction. Its refusal to accept such jurisdiction places it four-square in conflict with the authorities cited above and creates a question for review of exceptional importance.

III. The Fifth Circuit's Refusal to Hold That the Federal Courts Had Jurisdiction Over The Claims of Bad Faith, Retaliatory and Harassing Prosecution Again Placed It In Direct Conflict With A Number of Supreme Court and Other Circuit Court Decisions And Again Presents A Question of Exceptional Importance.

Perhaps the most blatantly erroneous statement of the Fifth Circuit is where it states:

> "The *Younger* doctrine, however, does not apply to the present matter. The state proceeding here in question is not ongoing and, thus, no question of intervention is presented."

App. A; 32 F.3d at 948. While it is true that the state proceeding in which

petitioner was condemned to three years suspension is no longer "ongoing", the Fifth Circuit misleadingly ignores the allegations in the complaint that there are other retaliatory and bad faith prosecutions against petitioner that are still "ongoing". See App. E, par. 3.42 and ftne. 8, supra.

There is no doubt that the petitioner adequately alleged the bad faith exception to the Younger doctrine (Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). The Fifth Circuit conceded as much in its first opinion and did not contradict that view in its second opinion. Compare App. A and App. B. Indeed, the complaint is replete with allegations of bad faith, retaliatory, harassing and discriminatory conduct toward petitioner. See pars. 3.11 - 3.43

(particularly 3.42 quoted above); 4.1 - 4.6; 5.1 - 5.4; 6.1-6.6; 7.1- 7.7 (conspiracy); and Prayer. App. E.

The holding of the Fifth Circuit that the federal courts do not have jurisdiction over petitioners bad faith claims is contrary to many Supreme Court decisions and decisions of other courts of appeals. See Dombrowski v. Pfiester, 380 U.S. 479, 85 S. Ct. 1116,1123 (1965) (establishing the rule that federal courts can issue injunctions against state court proceedings brought in bad faith); Younger, 91 S. Ct. at 752, 746, 749 (holding that the Dombrowski bad faith rule is an exception to the abstention doctrine);[17] Trainor v.

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[17]In its first opinion in this case, the Fifth Circuit correctly analyzed petitioner's bad faith allegations:

"The doctrinal underpinnings of this

Hernandez, 431 U.S. 434, 446, 97 S. Ct., 1911, 1919 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-602, 95 S. Ct., 200, 1206-07, 1212 (1975); Gibson v. Berryhill, 93 S. Ct. at 1697 (referring

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> 'bad faith exception' are rooted in the sister exception to the Younger doctrine . . . Younger does not apply to the present matter. . . (but) . . . (w)e nonetheless have previously borrowed Younger's framework in clarifying when federal courts may or may not become involved in state court decision making.
>
> The bad faith exception applies here. Musslewhite has alleged that the state's judicial machinery was appropriated in an effort to persecute him. Implicit in these allegations is that both the decision and the mechanism itself are not trustworthy. The federal courts must have subject matter jurisdiction if a claim of bad faith and harassment is ever to be proved, for the claim is levied against the proceedings themselves."

25 F. 3d at p. 1306; App. B.

to "bias" of judge or panel as being ground for "bad faith"); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 677-78, nte. 5 (1978) (making it clear that if Younger only applies where there are ongoing state court proceedings and if, as incorrectly found by the Fifth Circuit, there had been no on-going proceedings, the federal court would have, with even greater force, jurisdiction to address whether the judgment in the prior adjudicated case was the product of bad faith; McCune v. Frank, 521 F. 2d 1152 (2nd Cir.) 1158 (1975) (holding that "Younger presupposes the existence of a competent state forum. . . "; thus, if Judge Casseb was biased and/or the bad faith of the State Bar permeated the proceedings, the petitioner can attack the prior, completed

proceedings on the ground that they were the product of bad faith); Kercado - Malendez v. Aponte -Rogue, 829 F. 2d 255, 264 (1st Cir. 1987) ("political motive" can constitute bad faith and "may be shown by circumstantial evidence"); Matter of National Hospital & Institutional Bldg., 658 F. 2d 39, 44 (2nd Cir. 1981) defines "bad faith", sufficient for the Younger exception to apply, as consisting of "flagrant constitutional" violations; that the "state forum is biased"; that the prosecuting agency [the City in that case] "acted in willful disregard of the law"; that such agency "clearly abused its discretion in initiating proceedings"; or that the "state proceeding [was] motivated by a desire to harass . . . by ill will, or by any other

improper motivation"); Central Avenue News, Inc. v. City of Minot, 651 F. 2d 565 (8th Cir. 1981); Timmerman v. Brown, 528 F. 2d 811, 815 (4th Cir., 1975).

It is absolutely clear that the Fifth Circuit erred in not accepting jurisdiction with regard to the bad faith claims of petitioner; in not determining whether the ongoing state proceedings were the product of bad faith; and whether the court should have enjoined the ongoing state court proceedings.

In addition to the fact that the holding of the Fifth Circuit is in direct conflict with Supreme Court and other circuit court law, the bad faith exception is a very important part of this nation's body of civil rights law and the Court, we respectfully suggest, should grant writ in order to make it

clear that the bad faith exception must be honored and jurisdiction accepted when facts are alleged such as those alleged in this case.[18]

IV. Certiorari Is Appropriate With Respect To The Action Of The Fifth Circuit In Issuing A New Opinion More Than 21 Days After its Earlier Opinion.

Rule 41(a), F.R.A.P. states that the "mandate of the court shall issue 21 days after the entry of judgment....". While Rule 41 provides that the court of appeals can shorten or enlarge the time for issuing the mandate, the courts of

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[18] In Mitchum v. Foster, 407 U.S. 225 (1972), the Supreme Court stated that "the very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" pp. 915, 916 of Rutgers. See also Miofsky v. Superior Court, 703 F.2d 332, 335 (9th Circ. 1983).

other circuits have held that this can "only" be done "upon the same exceptional circumstances justifying a recall of the mandate." Adamson v. Lewis, 955 F.2d 614, 619 (9th Cir. 1992); Zipfel vs. Halliburton, 861 F.2d 565, 567 (9th Cir. 1988) (power to stay or recall mandates is not unlimited; it can be exercised only upon a showing of "good cause" or "exceptional circumstances"); Powers v. Bethlehem Steel Corporation, 483 F.2d 963, 964 (1st Cir. 1973) ("(a)lleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment..."); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277-280 (D.C. Cir. 1971) cert. den. 92S.Ct. 2642 (1972) (mandate may not be stayed or recalled simply because the court of

appeals later changes its mind); and Bryant v. Ford Motor Company, 886 F.2d 1526 (9th Cir. 1989).[19]

In this case, the Fifth Circuit, long after the 21 days had expired, simply changed its mind; withdrew its earlier opinion and substituted another without "good cause" or "exceptional circumstances". The power of the court to do this deserves consideration by this court.

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[19] The Sixth Circuit explained the rationale underlying this requirement:

> "In order to constitute good cause shown under the rule (Rule 41), there must be exceptional circumstances shown, which in the opinion of the court are sufficient to override the strong public policy that there should be an end to a case in litigation."

Hines v. Royal Indemnity Co., 253 F.2d 171 (6th Cir. 1958).

WHEREFORE, petitioner requests the Court to grant certiorari in this case for all the reasons stated above.

Respectfully submitted,

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